Supreme Court, U.S.
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No. 08-128

In the
Supreme Court of the United States

Donald R. Lewis
Petitioner

Vs.

Department of Agriculture
Respondent

On Petition for Rehearing of Petition for
Writ of Certiorari

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Questions Presented

1. When an employee retire with an effective date the same as the date of removal is the employee separated by retirement as in Mays v. Department of Transportation, 27F.3d 1577 (1994); Drumheller v. Department of Army, 55 MSPR 441 (1992); 5 USC Section 7701? Should the employee be provided a notification of Personnel Action, Standard Form 50 (SF-50), of the personnel action?

2. Did the Respondent violate Petitioner's rights to Equal Protection under the Law, Eighth Amendment of the U.S. Constitution, and due process rights by charging him four (4) times out of the six with negligence or unintentional conduct and then applying the element of intent for each charge in reaching the penalty of removal in violation of Alvarodo v. Department of the Air Force, 103 MSPR 1 (2006); Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985)? Has the tribunals committed the same violations and abused their discretion in failing to find such violations?

3. Has Petitioner been wrongfully deprived of fair and just reviews of threats, wrongful actions, and consideration of retirement contrary to the intent of Congress, the House Committee Report, and 5 USC Section 7701? Has the tribunals committed the same violations and abused their discretion in failing to find such violations?

4. Did the Respondent fail to follow its table of penalties with out showing that the deviations were justified by the circumstances of the case in violation of Williams v. Department of the Air Force, 32 MSPR 347 (1987)? Did the tribunals abuse their discretion and failed

to provide Petitioner with Equal Protection of the Law when they failed to find violations?

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Opinions and Orders Below

Donald R. Lewis V. Department of Agriculture, 2008-3031, March 7, 2008, United States Court of Appeals For The Federal Circuit, Decision

Donald R. Lewis v. Department of Agriculture, Docket Number DA-0752-06-0686-1-1, October 3, 2007, Merit Systems Protection Board, Final Order

Donald R. Lewis v. Department of Agriculture, Docket Number DA-0751-06-0686-1-1, May 10, 2007, Merit Systems Protection Board, Initial Decision

Donald R. Lewis v. Department of Agriculture, 2008-3031, May 1, 2008, Order of the United States Court of Appeals For The Federal Circuit denying Petition For Rehearing

Petition for Writ of Certiorari denied October 6, 2008, 2008, No. 08-128

Jurisdiction

The date on which the United States Court of Appeals For The Federal Circuit decided my case was March 7, 2008. Appendix A, presented July 25, 2008.

A timely petition for rehearing was denied by the United States Court of Appeals For the Federal Circuit on the following date: May 1, 2008, and a copy of the order denying rehearing appears as Appendix D, presented July 25, 2008.

Petition for Writ of Certiorari denied October 6, 2008.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Statement of The Case

The Petitioner entered Federal employment in 1971 as a Labor Management Relations Examiner with the National Labor Relations Board. In February 1989, he transferred to the U.S. Department of Agriculture, National Finance Center (NFC), in New Orleans, Louisiana as a GS-12 Supervisory Labor Relations Specialist, up graded to GS-13. In 1977, former NFC Director John Ortego selected Petitioner to design, develop, and manage what later became knows as the Equal Employment Opportunity and Workforce Services Staff (EEOWSS), due to a crisis of employment environment issues. See Appendix F.

In the position as manager, Petitioner almost single-handedly changed the employment environment of the Agency from one that had become nationally known for its poor employment environment to one nationally recognized for its model employment environment. He won national awards and recognition for himself and the Respondent, including such awards as the Office of Personnel Management Director's Award and the USDA's Secretary's Award for operating an efficient, effective, and discrimination free organization. See Appendix F. Petitioner is the only manger of EEO or EEOWSS programs for the Respondent to have won such awards for himself and the programs. He became knows as one of the most innovative and achieving EEO managers in the Federal Government. Prior to the charges in the within matter, Petitioner, in his over 36 year employment history with the Federal Government, had never been the subject of any disciplinary action. His performance was always at the Outstanding or Superior levels, with his last performance rating at the Outstanding

level. He served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for his war time service. The investigation and charges were instigated and orchestrated by one employee using it to get a promotion (Patricia Bachemin), and another employee (J. Nguyen), and her friends, who wanted the ultimate decision making responsibility to determine who would be included in the reduction-in-force (RIF). In February 2005, Bachemin actually went to the deciding official and sought two things: (1) a promotion, and (2) Petitioner's termination. She received both. The Agency refuses to present her at the hearing so that she could be examined by Petitioner. Virginia Gaye Cook, Head of Operations and Agency Misconduct Investigation Coordinator, prepared and sent a promotion position description to Petitioner for promotion of Bachemin that was fraudulent. By regulation and practice, Petitioner should have been the preparer of the position description. Cook became upset when Petitioner refused to sign the fraudulent position description. Bachemin was promoted shortly after Petitioner's proposed removal and administrative leave. The refusal of the Board and Appeal Court to address the position description and the Seavello issues deprived Petitioner of due process, equal protection of the law, and of protection against a prohibited personnel practice. Kushindana, a friend of J. Nguyen, told Petition that if he followed through with J. Nguyen being impacted by the RIF instead of M. Nguyen, that he could expect to have problems from her and others in the office. On August 3, 2005, Kushindana told Petitioner that since it appeared that he wasn't going to leave, she was going to have to run him off. See Appendix H. Only 16 days later, August 19, 2005, the Investigator who had been operating

in collusion with Kashindana, Bachemin, J Nguyen, and others, told Petitioner at the opening of his initial interview, "You ought to be out of her" and that he should be retired. Given the Investigator's conduct and gross procedural violations, it is Petitioner's position that the Investigator was hired to build a case for his removal.

Cook, arranged for Petitioner to be investigated by a contract investigator with whom she has close ties. The Investigator was instructed to investigate Petitioner for a period spanning over 40 years including years before his employment by the Federal Government. The charges were vague and non-specific as to when and what Petitioner allegedly did and denied his due process rights. When Petitioner could not agree with the conclusory comments under the charges on employees' weight, he was charged with making false statements during an official investigation. The investigator violated every provision of the procedural guidelines for investigation dated March 24, 2003 which states that "Investigators **should** avoid personal opinions, or conclusions, and **should not** make disciplinary recommendations a part of the report." See Appendix E. The Investigator violated these provisions and thereby denied Petitioner due process and equal protection under the law. This caused substantial prejudice to Petitioner's individual rights by affecting the agency's decision.

The Appeal Court and tribunals below failed to find harmful procedural error even though it is clear that the Respondent violated its own procedural guidelines in the investigation of Petitioner and in the use of the Report of Investigation in reaching the penalty decision to remove Petitioner. The Appeal Court and tribunal below violated Petitioner's Due Process Rights, First

Amendment of the U.S. Constitution, and Equal Protection Under The Law in their findings on Petitioner being provided conclusory statements rather than requested needed specifics such as descriptive details of alleged conclusory comments, dates, times, and places of alleged inappropriate comments, and the finding of Petitioner's inability to agree with the vague, conclusory, and non-specific charges as making false statements during an official investigation. They changed the charge on "directing" after the hearing and grossly misdescribed employees on the issue and their relationship with Petitioner. The Appeal Court and tribunals below upheld Respondent's charging Petitioner with unintentional/negligence and then applying the element of intent for the same charges by sustaining the Penalty of Removal on the basis of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985), wherein the Agency charged the Appellant with negligence but **improperly** removed him based on the element of intent. The Board and Appeal Court accepted the Respondent's use of conclusory, boiler plate language on penalty without a balanced and reasoned discussion of all relevant and mitigating factors. The table of penalties was not honestly considered.

When it became clear to Petitioner that the Respondent and this particular group of employees were determined to destroy him, Petitioner sought and received favorable consideration for employment by two other Federal agencies. One Agency offered Petitioner a position and he accepted. However, one day after the agency contacted the Respondent for transfer of Petitioner, the offer was withdrawn. When the other agency contacted Respondent for reference on Petitioner, the agency stopped their process of consideration. It

became clear to Petitioner at this point that the Respondent was interested in destroying Petitioner and not just removing him.

On August 29, 2005, Hurricane Katrina made landfall in New Orleans, Louisiana, and Petitioner evacuated. On February 22, 2006, Petitioner returned to New Orleans and Respondent facilities. On March 28, 2006, 34 days after Petitioner's return Respondent issued Petitioner a proposed removal letter and place him on administrative leave. Effective September 16, 2006, Petitioner was removed.

On April 18, 2008, during a return call to the Appeal Court on a request to submit copies of case decisions, and Appeal Court personnel began stating/asking Petitioner repeatedly out of the "blue", "you can retire can't you?" This placed Petitioner on notice that the Appeal Court had considered retirement eligibility when making a decision in his case. Petitioner has never raised an issue of retirement eligibility with any tribunal considering his case. See Appendix O.

The Appeal Court states on page 6 of its decision that Byrne's affidavit stated that she learned of the contract employee's conduct from another employee to whom I, J. Nguyen and Kushindana had complained. This is not Byrne's affidavit, The Appeal Court states on page 8 of their decision that "Mr. Lewis acknowledged that on at least one occasion he picked up one copy of Ms. Nguyen faxes and delivered it to her." There is no evidence in the record that Petitioner ever made such acknowledgement. On page 49 of the Board decision, the AJ states "The record further reflects that M. Nguyen's non-work related activities continued into August 2005."

Not true and not in the record. M. Nguyen was not in America from July 26, 2005, through August 26, 2005. She was on administrative leave from August 26, 2005, through November 14, 2005, due to Hurricane Katrina. The stating that such matters are in evidence in the record is an error, an abuse of discretion, and harm Petitioner by taking away his property interest in his employment.

After notice of Respondent's removal decision, Petitioner retired with an effective date of September 16, 2006, the same date of the removal notice. When an employee retire on the effective date of his/her removal, the employee is actually separated by retirement. Mays v. Department of Transportation, 27 F.3d 577 (1994); Drumheller v. Department of Army, 55 MSPR 441 (1992); 5 USC Section 7701. Petitioner has never received a Notification of Personnel Action, Standard Form 50 (SF-50) for his retirement.

Reasons For Granting The Petitioner
For Rehearing

When an employee retire on the effective date of his/her removal, the employee is actually separated by retirement, Mays v. Department of Transportation, 27 F.3d 1577 (1994); Drumheller v. Department of Army, 55 MSPR 441 (1992); 5 USC Section 7701. After notice of the Respondent's decision, Petitioner retired with an effective date of September 16, 2006, the same date of the removal notice. Petitioner has never received a Notification of Personnel Action, Standard Form 50 (SF-50), for his retirement. This failure has been continuous to the present. These are intervening circumstances of substantial and controlling effect not previously presented to this Court. See also Tracy P. Nguyen v. Department of the Navy, MSPR (1999), Docket Number DC-0752-98-0850-E-1, whercin mootness resulted. Mootness can arise at any stage of litigation.

This has harmed Petitioner in his ability to seek employment in the same manner as the Respondent harmed Petitioner when he sought and received one position and favorable consideration for another after it became clear to him that Respondent was out to destroy him.

5 USC Section 7701 supports that retirement should never have been a factor in the United States Court of Appeals For the Federal Circuits decision in this case. The U.S. Court of Appeals for the Federal Circuits personnel stating to Petitioner that retirement eligibility was taken into consideration in the decision in his case violates the United States Code and Congress intent. The House Committee Report supports an employee's right to

have separation as retirement under circumstances faced by Petitioner.

Petitioner's employment rights, and right to gain employment has been wrongfully taken away with no place to go for a fair and just review. Notwithstanding his honorable service as a draftee in the U.S. Army for war time service and Outstanding service as a civilian, he is not accorded fundamental and basic rights accorded other U.S. citizens in the above cited cases and in other cases cited to the Court earlier in this process.

In addition to the wrongful charging of Petitioner with negligent or unintentional conduct in charge 1 (Receipt of government funds without securing required management approval) and then wrongfully using intent on this charge to reach the penalty of removal, Petitioner suffered other substantial grounds of being charged with negligent or unintentional conduct and then punished with the element of intent in the penalty. Specifically, Petitioner was charged with Failure to take appropriate management action (Charge 2), allowing subordinate employees to conduct private business for personal gain using government time and equipment (Charge 3), and Inappropriate management and personal conduct (Charge 5), and then punished with the element of intent in the penalty. These are substantial and controlling grounds not previously presented. In Alvarado v. Department of the Air Force, 103 MSPR 1 (2006) the Board stated that where an agency charges an appellant in a manner that requires the agency to prove that the appellant's actions were willful and intentional, proof that the appellant's actions were negligent or unintentional will not suffice. Petitioner begs the Court to afford him the same rights and protection of citizens of the United States. He is a

citizen. He was born in America and served this country honorably by way of the draft in the U.S. Army during the Vietnam War. All he wants is his name cleared so that he can go forward to seek employment else where. The law as set forth in Mays, supra; Drumheller, supra; 5 USC Section 7701; and Alvardo, supra, should be accorded Petitioner. In their closing brief, the agency expressly stated that when considering penalty the Deciding Official considered Petitioner's conduct for the above identified charges as "deliberate" and "malicious", terms that require intent to be proven when Petitioner was in fact charged with unintentional or negligent. To allow Respondent to subject Petitioner to the penalty and punishment level of intent without charging him with such for four or more charges is a substantial abuse of discretion and denial of Equal Protection of the Law. The accumulative gross wrongful application of these unintentional/negligent charges to the penalty as intent has harmed Petitioner, denied him Equal Protection of the Law and Due Process. See also Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985).

The agency's failure to follow its table of penalties is substantial and was not previously presented to this Court. Where the agency has a table of penalties it must adhere to the guidelines in the table unless it can show that deviation from the suggested penalty is justified by the circumstances of the case. Williams v. Department of the Air Force, 32 MSPR 347 (1987). As can be gleamed from the table provided earlier in this process, the table was not followed for any charge and the deviation was not justified by the circumstances of the case.

Conclusion

This petition for rehearing should be granted. Intervening circumstances of a substantial and controlling effect exist and substantial grounds not previously presented are set forth. Petitioner retired on the effective date of Respondent's removal action in hope that the law would apply to him as in Mays, supra. Respondent's motive to get rid of Petitioner was accomplished with the effective date of his retirement (September 16, 2006). The matter was moot except for Respondent's motive to go farther and destroy Petitioner. The law is clear. When an employee retire on the effective date of his/her removal, the employee is actually separated by retirement. See also the United States Code, Section 7701, the House Committee Report, and Congress intent. Additionally see Drumheller, supra, Mays, supra, and the United States Code cited therein. Petitioner has been harmed by this failure to apply the law. Petitioner has been a good and outstanding citizen of this country by all accounts. Despite the denial of rights and protections, many by State action, including the denial of use of facilities and at one point in time in grade school being without a school to attend, Petitioner has gone forward in life and remained an honorable citizen. The announcement of threats to harm Petitioner and run him off from his employment where he served at the Outstanding level has continuously been ignored by all tribunals. Neither Petitioner or any other citizen should be denied protection from such threats and actions.

From Petitioner's separation by retirement to the present, Respondent has failed to provide him with notification of Personnel Action, form SF-50, noting such. Respondent's motive for harming Petitioner in his efforts

to go forward in life and gain other employment has to be noted by this Court. Petitioner's long,

honorable, and discipline free employment with continuous high performance should be weighed by this Court in any analysis and decision.

Donald R. Lewis
Pro Se

Date: 10/24/08

In The
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Vs.

Department of Agriculture
Respondent

Petitioner certifies that the Petition for Rehearing of Denial of Writ of Certiorari is restricted to the grounds limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Not for delay,

I declare under penalty of perjury that the foregoing is true and correct.

Donald R. Lewis

Donald R. Lewis
Pro Se

Date: 10/24/08